Supreme Court, U.S.
FILED

(V) No. 93-1844

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

GUSTAVO PIMENTEL,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[Filed December 20, 1993]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	D016597
v.	(Super. Ct. No. CR125354)
GUSTAVO PIMENTEL,	
Defendant and Appellant.	OPINION

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exarhos, Judge. Reversed.

A jury convicted Gustavo Pimentel (Pimentel) of murder in the second degree of Luis Coronado (Coronado) (Pen. Code,[1] § 187, subd. (a)) and found Pimentel had been personally armed with a firearm (§

1. All code references are to the Penal Code unless otherwise specified.

been personally armed with a firearm (§ 12022, subd. (a)(1)). The trial judge sentenced Pimentel to a total term of 16 years to life.

Pimentel contends his admissions to interrogating officers should have been excluded at trial. He also raises several claims of instructional error. We conclude reversal is required on the first ground: Pimentel's admissions to interrogating officer should have been excluded because the officers subjected him to a custodial interrogation without first advising him of his Miranda[2/] rights. We find no error in the various instructions given, or refused, by the court.

FACTUAL BACKGROUND

Coronado's killing was the result of rivalry and animosity between the Logan

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2. Miranda v. Arizona (1966) 384 U.S. 436, 479.

Heights Calle Treinte (Calle Treinte) and the Old Town National City (OTNC) street gangs.

OTNC gang members 16-year-old Enrique Diaz (Diaz) and 15-year-old Rudy Cedano (Cedano) testified that at about 10 or 10:30 p.m. on June 28, 1991, they drove, with Miguel Mejia, another youth and two girls, to the 7-Eleven store at 24th and Highland in National City where they planned to steal beer. Diaz and Cedano said while they were in the store two young men entered and identified themselves as Calle Treinte members. The youths entered the store and began fighting; then the Calle Treinte members ran to their car and drove away. Diaz described the car as a metallic blue Buick Regal or Chevrolet Monte Carlo or Oldsmobile, and identified Pimentel's car as the one he saw. Although Diaz and Cedano were unable to identify Pimentel

from a photographic lineup, at trial they identified him as the driver of the car.

Former Calle Treinte gang member Javier Aguirre (Aguirre) testified that at about 12:30 a.m. the following day, he and Calle Treinte member Jerry Ortega (Ortega) drove in Aguirre's 1983 Blue Monte Carlo to the same 7-Eleven store to buy alcohol. He said that inside the store Ortega started a fight wit some OTNC gang members, who chased Ortega to the car, hitting him as he tried to enter it. Aguirre said he then tried to run over the OTNC boys with his car.

Aguirre testified that he and Ortega then drove to Memorial Park, where he saw Pimentel with Felipe Juarez (Juarez) and watched Juarez put something in the waistband of his pants. Aguirre said Pimentel and Juarez soon left together in Pimentel's 1979 blue Monte Carlo and returned at about 1 a.m.

Nineteen-year-old OTNC member Eddie Bellot (Bellot) and fellow OTNC member Gabriel Mejia testified that on that same night they were hanging out with 18-year-old Coronado at the corner of Coolidge and 16th Streets in National City. They said that at about 12:30 to 12:45 a.m. a blue Regal or Monte Carlo pulled up, a passenger got out, walked to the rear of the car, and asked Bellot and the others where they were from. They replied, "OTNC." Words were exchanged, and Bellot and Coronado walked toward the man expecting to fight. However, when the man pulled a gun from under his shirt, Bellot and Coronado began running and shots were fired. Bellot said he heard Coronado call his name and when he turned around, Coronado was lying on the ground and the car and shooter were gone. Coronado died at the scene from multiple gunshot wounds.

National City Police Detective Craig Boegler (Boegler) issued a bulletin to law enforcement agencies describing the car in which the shooter was seen riding as a 1978-1979 blue two-door Monte Carlo, believed to be driven by a Calle Treinte member. Pimentel was stopped by police three times between July 3 and July 18 because his car matched the description in the bulletin. Police photographed his car and sent reports to Boegler.

On July 29, 1991, after Diaz identified Pimentel's car from a photograph as the one he had seen at the 7-Eleven store on June 28, Boegler and district attorney's office investigator Robert Marquez (Marquez) went to Pimentel's place of employment and took more photographs of his car. When Pimentel came out and asked what they were doing, they explained his car matched the description of the one involved in the

shooting. Pimentel agreed to go to the National City Police station to talk with Boegler and Marquez; however, because Pimentel had very little gasoline in his car, Boegler and Marquez followed him to his home, where he left the car and then rode with them to the police station. They told Pimentel he was free to leave at any time.

At the police station Boegler and Marquez began interviewing Pimentel. After about one and one-half to two hours of discussion, Boegler falsely told Pimentel that his car had been videotaped at the 7-Eleven store on June 28, and Pimentel agreed he had been at the store and that his passenger had been in an altercation with OTNC members. Boegler then advised Pimentel of his Miranda rights, which Pimentel waived. The remainder of the interview was taped.

During the taped interview Pimentel first stated that on the evening of June 28 he and Christian Gonzales (Christian) had driven to the 7-Eleven store, where Christian had become involved in a fight. Pimentel said he then drove to Memorial Park, dropped off Christian and his brother Juan, and then drove home. He later changed his story, saying Juarez and Joe Ayala (Ayala) had also been in the car. Pimentel then denied either of these accounts was true and claimed he had not been involved.

Pimentel then said he had driven to the scene of the shooting with Christian and Juan, where Christian had fired at a group of youths. Pimentel then retracted this story, stating he had been at the 7-Eleven but had not been involved in the shooting. At this point Boegler arrested Pimentel for Coronado's murder.

Boegler and Marquez interviewed Pimentel again the following day. Pimentel again waived his Miranda rights and the interview was taped. During this interview Pimentel said that on the evening of June 28 he and Juarez had fought with some OTNC members at the 7-Eleven, then drove to Memorial Park, where Juarez retrieved a gun from a hiding place, and then returned to National City. There, they say a group on a street corner. Juarez made a gang sign and got out of the car. Pimentel said he then heard gunshots and saw Coronado fall; Juarez jumped into the car and the two drove back to the park.

Bellot and Gabriel Mejia identified Juarez as the shooter and Pimentel's car as the one in which the shooter had been riding.[3/]

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3. Juarez was arrested for Coronado's murder and joined with Pimentel as a codefendant. However, at

At trial, Pimentel denied having driven the car involved in the shooting. He testified that on the night of the shooting he left work at around 9:30 p.m. and went home. Other members of his family verified that he had spent the entire night at home with them.

Pimentel testified that during the police interviews he felt pressured and merely told Boegler and Marquez what he thought they wanted to hear. He explained he agreed with Boegler and Marquez's version because they led him to believe if he did not cooperate he would face a lengthy sentence, whereas if he said what they wanted to hear his sentence would be only four or five years.

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the time of Pimentel's trial, criminal proceedings against Juarez had been suspended under section 1368. The prosecution's motion to continue Pimentel's case until Juarez's competency could be established was denied by the trial court.

The jury found Pimentel guilty of second degree murder and further found he had been armed with a firearm. The trial court sentenced him to fifteen years to life for the murder conviction and to one year for being armed with a firearm. Pimentel appeals.

DISCUSSION

I. Admission of Pimentel's Confession

Pimentel contends his admissions and confession to the interrogating officers should have been excluded because the officers subjected him to a custodial interrogation without first advising him of his Miranda rights. We agree.

Prior to trial, Pimentel moved to exclude the statements he made during the police station interviews, arguing that he had been wrongfully subjected to a custodial interrogation without first being advised of his Miranda rights and that, in any event, the admissions were

involuntary. The trial court ruled there was no basis to suppress under Miranda and permitted the statements to be introduced at trial.

Under Miranda v. Arizona, supra, an individual may not be subjected to interrogation in official custody unless he previously has been advised of an has knowingly and intelligently waived his right to silence, to an attorney and to an appointed attorney if he cannot afford to hire counsel. By bracing against "the possibility of unreliable statements in every instance of in-custody interrogation" Miranda serves to guard against the use of unreliable statements at trial. (Johnson v. New Jersey (1966) 384 U.S. 719, 730.) A Miranda advisement is required when a person is subjected to questioning after he "has been taken into custody or otherwise deprived of his freedom of action in any significant way."

(People v. Lopez (1985) 163 Cal.App.3d 602, 605.) "`[T]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associate with a formal arrest.'" (People v. Morris (1991) 53 Cal.3d 152, 197, quoting California v. Beheler (1983) 463 U.S. 1121, 1125 and Oregon v. Mathiason (1977) 429 U.S. 492, 495.) When there has been no formal arrest, the relevant question is "how a reasonable man in the suspect's position would have understood the situation." (Berkemer v. McCarty (1984) 468 U.S. 420, 422.) "In deciding the custody issue, the totality of circumstances is relevant, and no one factor is dispositive." (People v. Boyer (1989) 48 Cal.3d 247,272.) "[T]he most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia

of arrest are present, and (4) the length and form of questioning." (Ibid.) "[T]he mere fact that [an individual] was a suspect does not establish custodial interrogation." (People v. Morris, supra, 53 Cal.3d at p. 197.) "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (Oregon v. Mathiason (1977) 429 U.S. 492, 495.)

In reviewing a claim of this nature we "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported." (People v. Boyer, supra, 48 Cal.3d at p. 263.) "However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement[s] were illegally obtained." (Ibid.) We therefore must scrutinize the evidence to determine

whether the interrogation of Pimentel became an "in custody" examination before the Miranda warning was given.

We are satisfied that the interrogation initially was non-custodial in nature. Pimentel's car had been stopped three times previous to the incident now in question, and the police obviously considered of importance the similarity of his car to that identified as the one used in the homicide. When they encountered Pimentel on the day in question they were again inspecting and taking pictures of the car. The initial questioning of Pimentel, in the parking lot, was the result of his voluntarily approaching and questioning the police. The subsequent adjournment to the police department was because of the suggestion that it would look bad for Pimentel to be talking to police in the parking lot.

The subsequent events leading to the interview at the police station also indicate a voluntary meeting with the police. The officers accompanied him to his home because he did not have enough gasoline to drive to the station; they waited while he changed clothes; when he departed he informed his family he would return in a couple of hours.

The initial events at the police station reinforced the conclusion that the interview was voluntary. Upon arrival at the police station Boegler and Marquez told Pimentel he could leave at any time. Marquez testified that when he and Boegler first contacted Pimentel they had not considered him the focus of their investigation and had not intended to talk to him, but merely wanted to photograph his car.

Circumstances changed, however, during the interview. While the

questioning initially related to general subjects to which Pimentel could have responded without incriminating himself, it thereafter became much more focused. The crucial shift in questioning in our opinion came when the officers commenced falsely advising Pimentel that they had a videotape of his car at the store on June 28. At this point we believe Pimentel ceased to be simply a source of general information, or even one of several possible leads, and became the focus of the investigation. It is difficult for us to believe that the officers would commence telling Pimentel falsehoods which directly linked him to the crime if they were not at that point endeavoring to extract a confession or admission from him. (Cf. People v. Boyer, supra, 48 Cal.3d 247, 264-265.)

The Miranda warning was not given until after this focused interrogation was

commenced; it was not given until after the officers had gotten Pimentel to admit he was at the 7-Eleven during the fight with the OTNC members. After reviewing the totality of the circumstances, as directed in Boyer (i.e., the setting at the police station, the one and one-half to two hours of interrogation before Miranda advisement was given, and the use of false information to elicit an admission (fn. 4, ante)) we conclude a reasonable man in Pimentel's situation would have understood his freedom of movement had become so restricted that he was "in custody." The interrogation became custodial before Pimentel was advised of his Miranda rights.

Under California law a non-Mirandized confession is presumed to taint a later Mirandized confession. (People v. Celaya (1987) 191 Cal.App.3d 665, 673.) This is because of the psychological or

practical disadvantages of having "'let the cat out of the bag by confessing.'" (People v. Sims (1993) 5 Cal.4th 405, 445, quoting People v. Johnson (1969) 70 Cal.2d 541, 547.) The admissions and confessions which followed Pimentel's initial admission to being present at the 7-Eleven during the altercation that evening were inextricably connected to the first admission. The statements during the first day's taped interview were part of the same continuous interrogation conducted at the same location by the same officers. The second day's interview was but a continuation of the first. The taped post-Miranda admissions and confessions were the product of the initial pre-Miranda custodial interrogation and were improperly admitted.

The erroneous admission of an involuntary confession does not require

automatic reversal. (People v. Sims, supra, 5 Cal.4th at p. 447; People v. Cahill (1993) 5 Cal.4th 478, 509.) The prejudicial effect of the erroneous admission of a coerced confession is determined for purposes of California law under the Watson standard of whether there is a reasonable probability of a different result absent the error. (People v. Cahill, supra, 5 Cal.4th at pp. 509-510.) If a confession has been held inadmissible under the federal Constitution, the prejudicial effect of its admittance is judged under the federal Chapman standard of whether error was harmless beyond a reasonable doubt. (People v. Sims, supra, 5 Cal.4th at p. 447; People v. Cahill, supra, 5 Cal.4th at p. 510.)

The taped interviews were unquestionably prejudicial to Pimentel. During the interviews he admitted driving to the 7-Eleven, being present there

during the fight with OTNC members, returning to Memorial Park where the shooter retrieved a gun, and then driving the shooter back to National City and being present during Coronado's killing. Although rival gang members identified him as being at the altercation at the 7-Eleven, none of these witnesses was able to identify him from the scene of the shooting, only recognizing his car. The prosecution's case depended upon Pimentel's statements to the officers. Admission of the taped confession was prejudicial error.

II. Other Asserted Error

Pimentel raises a number of other contentions on appeal, all of which have to do with asserted errors in the court's instructions. Since we have determined a new trial is required because of violation of basic constitutional rights of the defendant, our discussion of other

possible areas of trial error might be considered unnecessary. However, for the court's guidance in the event the case is retried and in the further event the same controversies with respect to proffered instructions arise, we venture the following observations.

The court refused to give instructions on the evaluation of eye-witness testimony (CALJIC Nos. 2.91 and 2.92), based upon the court's conclusion that there had ben no eye-witness testimony identifying the defendant as the perpetrator of the crime. This determination missed the point that the identification of the car involved in the crime, as well as in the preceding 7-Eleven incident, was crucial to the case, and further that it was at least theoretically subject to question. Whether failure to give the instructions was prejudicial we do not now determine.

If the same evidentiary circumstances presents itself in retrial, however, we believe it would be better practice to give the instructions.

Pimentel next contends instructions should have been given on the possibly lesser-included offense of voluntary manslaughter based upon a killing influenced by heat of passion, as well as an instruction on the complete defense of self-defense. "`"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the cases are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (People v. Wickersham

(1982) 32 Cal.3 307, 323, quoting People v. St. Martin (1970) 1 Cal.3d 524, 531.)

We believe the court did not err in finding insufficient evidence to warrant the giving of these instructions. The evidence established that Pimentel's car arrived at the scene of the crime some substantial period later than the affray at the 7-Eleven, a factor effectively undermining any claim of an act done in the heat of passion. As for self-defense, the evidence established that the occupants of Pimentel's car got out and walked toward the victims, and that when they approached, the assailant drew a gun and fired at the unarmed Coronado. The court did not exceed the bounds of discretion, we believe, in concluding that the very minimal evidence suggesting a possible fight before the shooting (two large chunks of concrete in the street which might have been used as offensive

weapons) was insufficient to warrant the instruction.

Pimentel also contends a lesser-included offense instruction should have been given on the theory of a killing occurring during the commission of a misdemeanor, which results in the crime of involuntary manslaughter. (§ 192, subd. (b); People v. Wilson (1967) 66 Cal.2d 749, 763.) The evidence was susceptible of the conclusion that the original intent of the assailant was merely to scare the opposing gang members, Pimentel argues, which crime is the misdemeanor brandishing of a firearm under section 417, subdivision (a)(2). If a killing resulted during the commission of this offense, it is argued, it should have been classified as a misdemeanor.

This analysis overlooks the only direct evidence in the case related to the shooting, which was that Juarez, the

assailant, pulled his gun before any contact was made with the opposing gang members, and shot Coronado at close range as he was running away. The misdemeanor-manslaughter theory of section 192, subdivision (b) applies only to crimes committed without malice. Where a person deliberately performs an act dangerous to life, knowing that his conduct endangers the life of another, and performs it in a conscious disregard for life, malice will be implied. (See People v. Nieto Benitez (1992) 4 Cal.4th 91, 111; 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) 1993 Supp., § 503, pp. 98-100.) Advancing on an opponent with a firearm, and then shooting the victim as he is running away, is a set of circumstances impelling a finding of malice, and precluding

application of the misdemeanor-manslaughter principle.[4/]

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4. Having agreed that the lesser-included offense instructions, under the evidentiary circumstances of this case, were properly denied, we nevertheless must comment on a possible misinterpretation of relevant law entertained by the prosecution and conceivably by the court. The contention was that since Pimentel denied being at the scene of the crime, asserting an alibi defense, the lesser-included offense possibilities were somehow inapplicable to him. The prosecution's case against Pimentel was based on aider and abettor liability. The court instructed on this theory by giving CALJIC Nos. 3.00 and 3.01, which teach that an aider and abettor is guilty of crime not for an act which he himself perpetrates, but for the criminal act of his principal in crime. (People v. Beeman (1984) 35 Cal.3d 547, 560; People v. Durham (1969) 70 Cal.2d 171, 181.) The aider and abettor's liability, therefore, is "derivative." (See Kadish, "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 Cal.L.Rev. 323 at p. 337.) Hence, the aider and abettor is entitled to any defense or lesser-included offense instruction to which the principal perpetrator may be entitled. If, therefore, the actual assailant in this case, Juarez, should be entitled under the evidence to a lesser-included offense instruction, Pimentel would be equally so entitled.

Finally, at oral argument Pimentel raises for our consideration the newly articulated concept of the requirement of instruction on the elements of the underlying or "predicate" crime contemplated by the aider and abettor. Set forth in People v. Mouton (1993) 15 Cal.App.4th 1313, 1320, this theory grows from the principle, as recited in CALJIC No. 3.02, that an aider and abettor is guilty not only of the "particular crime that to his knowledge his confederates are contemplating committing, but his knowledge his confederates are contemplating committing, but he is also liable for natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted." In order to arrive at a conclusion as to what was "natural and probable consequence" of an originally contemplated crime, the Mouton court said,

one must determine what that "predicate" crime was. Hence it is error to refrain from giving instructions not only as to the crime charged but also as to all possible uncharged predicate crimes.

We have very recently considered this issue in some depth in People v. Solis (1993) ____ Cal.App.4th ____ (1993 D.A.R. 14837). We concluded that the focus on the predicate criminal activity was an issue of fact, not requiring criminal definition. We opined that a requirement of instruction on the various possible predicate crimes would be an unwarranted and confusing addition to what are already somewhat confusing and abstract instructions. We do not now depart from this view, and hence reject Pimentel's contentions based on People v. Mouton.[5/]

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5. The essence of our opinion is Solis was that the added instruction(s) required by the theory of Mouton were not necessary, and very likely could be confusing. We did not indicate, and do

DISPOSITION

The judgment is reversed .

Froehlich, J.

I concur:

Todd, J.

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not hold in this case, that the giving of such instruction(s) on the elements of a "predicate" offense would be error. As the concurring and dissenting opinion points out, if this case is retired the trial judge may, in an abundance of caution, add certain instructions pertaining to the predicate offenses which our opinion in Solis might suggest are unnecessary.

Wiener, J., concurring and dissenting:

I concur in the judgment reversing Pimentel's conviction. I also agree the trial court should not be bound from following People v. Mouton (1993) 15 Cal.App.4th 1313. It is both fair to defendant and judicially economical to allow the trial court this latitude where the California Supreme Court may disagree with People v. Solis (1993) ___ Cal.App.4th ____. Moreover, even if the Supreme Court denies review, but decertifies Solis, the trial court should not be prevented from following Mouton because our decision to the contrary has become law of the case. My agreement on giving the trial court appropriate flexibility reflects my conclusion, reinforced by the Supreme Court having unanimously denied review on August 19, 1993, that Mouton was correctly decided.

Accordingly, I respectfully dissent from that portion of the opinion which rejects Pimentel's contentions based on Mouton.

/s/

WEINER, Acting P.J.

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APPENDIX B

APPENDIX B

[Filed March 24, 1994]

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division One, No. D016597

S037579

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

GUSTAVO PIMENTEL

Respondent's petition for review DENIED.

Lucas, C. J. and George, J. are of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

APPENDIX C

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

Office of the County Clerk
San Diego County
220 W. Broadway Street
San Diego, CA 92101

RE: PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff-Respondent
v.
PIMENTEL, GUSTAVO
Defendant-Appellant
D016597
San Diego County No. CR125354

* * REMITTITUR * *

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above entitled cause on December 20, 1993, and that this opinion or decision has now become final.

__Appellant __Respondent to recover Costs.
__Each party to bear own costs.
X Costs are not awarded in this proceeding.

Witness my hand and the seal of
the court affixed this

April 21, 1994

STEPHEN M. KELLY, Clerk

By: Jean Cook
Deputy Clerk

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).